LIBRARY

Supreme Court, U. S.
FILED
DEC 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

TERM

DOCKET NO. 75-847 1

BEFWICK OF PHILADELPHIA, INC.,
Petitioner,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY
t/a THE PUBLIC LEDGER BUILDING,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

PAUL AUERBACH,
Attorney for Petitioner,

212 Sycamore Avenue,
Merion, Pennsylvania 19066
(215) 841-4258

Pennsylvania Appellate Printing Co. — Call Toll Free (800) 631-5527

TABLE OF CONTENTS

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania 1

Citations to Opinion Below 1

Jurisdiction 1

Questions Presented 2

Constitutional Provisions and Statutes Involved 2

Statement of Facts 3

How Federal Questions are Presented 8

Reasons for Granting the Writ 10

I. Failure to obtain a hearing 10

II. The right to a reasoned opinion 13

Conclusion 19

CASES CITED:

Abbott v. Thetford,
354 F. Supp. 1280 (M.D. Alabama N.D. 1973) 10, 13

Barraclough et ux v. The Atlantic Refining Co.,
230 Pa. Super. 276 (1974) 12

Board of Regents of State Colleges et al. v. Roth,
408 U.S. 564, 33 L.Ed.2d 548,
92 S. Ct. 2701 (1972) 10, 12, 13, 15, 19

Clarke et al. v. Western Assurance Co.,
146 Pa. 561 15

Com. v. Schall et al.,
6 Pa. Com. Ct. 578 12

TABLE OF CONTENTS

CASES CITED:

Darrough v. Estelle,
497 F.2d 1007 (5th Cir. 1974) 15

Goldberg v. Kelly et al.,
397 U.S. 254, 25 L.E.d.2d 287
90 S. Ct. 1011 (1970) 10, 13, 17

Grosjean v. American Press Co., Inc. et al.,
297 U.S. 233, 80 L.Ed. 660 (1935) 10

Johnson v. Angle et al.,
341 F. Supp. 1043 (D.C. Nebraska, 1973) 10, 18

Louis K. Liggett Co. et al. v. Lee et al.,
288 U.S. 517, 77 L.Ed 929 (1932) 10

Morgan et al. v. U.S.A. et al.,
304 U.S. 1, 82 L. Ed.2d 1129 (1937) 10, 13, 18

Silver et al. v. New York Stock Exchange,
373 U.S. 341, 10 L.Ed.2d 389,
83 S. Ct. 1246 (1963) 10, 18, 20

Sims et al. v. Juras et al.,
313 F. Supp. 1212 (D.C. Oregon, 1969) .. 10, 13, 18

Snopassky v. Baer,
439 Pa. 140 18

Trader v. State of Maryland,
315 A.2d 528 (1974) 15

Universal Builders Supply Inc. v. Shaler Highlands Corp.,
405 Pa. 259 ..... 4, 6, 10, 12

Willner v. Committee on Character and Fitness et al.,
373 U.S. 96, 10 L.Ed.2d 224,
83 S. Ct. 1175 (1963) 10, 17

TABLE OF CONTENTS

U.S. CONSTITUTION CITED:

Fourteenth Amendment, Section 1 ..... 2, 10, 15

U.S. CODE CITED:

28 U.S.C. 1257(3) 2

28 U.S.C. 2101 2

STATUTE CITED:

Pa. Landlord & Tenant Act of 1951,
69 P.S. 250, 501, 504 ..... 3, 4, 10, 11, 19

RULES CITED:

Pa. Rules of Civil Procedure
12 P.S. 209 ..... 3, 4, 8, 11, 14, 19

Pa. Rules of Civil Procedure
12 P.S. 3162 ..... 3, 4, 10, 11, 12, 19

AUTHORITIES CITED:

James N. Gardner, October 1975 issue, American Bar Association Journal pp. 1224-1225 ..... 14, 20

Black's Legal Dictionary 15

TABLE OF CONTENTS

APPENDIX

Order (Supreme Court of Pennsylvania) 1a

Order (Superior Court of Pennsylvania) 2a

Petition for Rule to Show Cause Why Writ of Possession Should not be Stricken 3a

Rule to Show Cause Why Writ of Possession Should not be Stricken 6a

Memorandum Opinion 7a

Appellant's Petition for Reargument 9a

Response of Appellee Massachusetts Mutual Life Insurance Company to Appellant's Petition for Reargument 14a

Letter Dated June 4, 1973 to David Freeman from Charles A. Hoenstine 15a

Petition for Allocatur 16a

Response of Massachusetts Mutual Life Insurance Company to Befwick of Philadelphia, Inc's Petition for Allocatur 21a

Letter Dated October 24, 1973 to David Freeman from Patrick N. Bolsinger 22a

Rules of Civil Procedure 23a

Superior Court Brief of Appellant (Pages 10 and 11) 25a

Supreme Court Brief of Appellant 27a

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Befwick of Philadelphia, Inc., respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Pennsylvania which per curiam, without opinion, affirmed the Order of the Pennsylvania Superior Court which affirmed per curiam, without opinion, the Order of the Court of Common Pleas of Philadelphia County which refused to stay execution of a Writ of Possession against your petitioner.

CITATIONS TO OPINION BELOW

The per curiam Order of the Supreme Court of Pennsylvania is not reported as this petition goes to the printers and a copy thereof is attached and found in Appendix Pa1).*

The per curiam Order of the Pennsylvania Superior Court is found at 306 A.2d 915 and is attached and found in Appendix (Pa2).

The Order of the Court of Common Pleas, Philadelphia County and the inadequate Memorandum of Law (issued only after appeal) not adopted by either the Pennsylvania Superior and/or Supreme Courts are unreported and a copy thereof is attached and found in Appendix (Pa7).

JURISDICTION

The Order of the Philadelphia Court of Common Pleas is dated January 19, 1973 and the subsequent Memorandum of Law is dated March 6, 1973. The Order of

*Pa refers to Petitioner's Appendix.

the Pennsylvania Superior Court is dated May 17, 1973 and the denial of the Petition for Reargument is dated June 1, 1973. The Order of the Pennsylvania Supreme Court is dated October 3, 1975. The jurisdiction of this Court is involved under Title 28 U.S.C. Section 1257 (3) and 2101 (c) since petitioner's rights under the Fourteenth Amendment to the Constitution of the United States are drawn in question.

QUESTIONS PRESENTED

The following Questions are presented by this appeal:

1. Has your petitioner been denied due process of law where it has been clearly denied: (1) a hearing on its Petition to stay execution of a writ of possession; (2) the right to conduct depositions in support of said Petition; and (3) the right to amend its Petition all of which rights are contrary to the decisional law and procedural rules of the Commonwealth of Pennsylvania?

2. Has your petitioner been denied due process of law where its business has been literally destroyed by Orders of the various Courts without any opinion whatsoever detailing the reasons therefor (Pennsylvania Supreme and Superior Court) and/or based on a memorandum opinion of a lower court judge which opinion clearly ignored all the critical issues in the case, which opinion was not issued until after said Court allowed your petitioner to be ejected from the premises without hearing and which opinion was not adopted by the appellate courts which, nevertheless, affirmed the Order without stating reasons therefor?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutory and constitutional provisions involved in this appeal are the Fourteenth Amendment, Section 1

of the United States Constitution, and Pennsylvania Rules of Procedure 3162 and 209 found at 12 P.S. 3162 and 209, all of which sources are attached and found in the Appendix at (Pa23, Pa24).[1]

STATEMENT OF FACTS

The subject action concerns a breakdown in a commercial landlord (Massachusetts Mutual Life Insurance Company t/a Public Ledger Building–hereinafter Ledger)– tenant (Befwick of Philadelphia, Inc. petitioner–hereinafter, Befwick) relationship. Ledger, in 1972, filed an action in ejectment. Befwick, a small corporation consisting of about fifty shareholders, opposed same and filed an appropriate petition. After depositions were taken, the parties, on their own, negotiated a settlement which became a consent decree dated November 14, 1972.

The terms of said decree allowed for judgment on the ejectment action but stayed enforcement and called for two payments (totalling $6570.00) to Ledger by December 1, 1972. Befwick entered into the consent decree relying on a promise of a loan from a credit institution and, therefore, issued checks dated appropriately. For reasons, suspicious in nature, the lending institution reneged on its promises. Befwick notified Ledger that the checks would not clear and set about obtaining the funds from a different source. On December 7, 1972 the President of Befwick notified Ledger thru counsel that he had obtained the funds on his own credit and that the checks would clear if deposited on December 8, 1972.

Meanwhile (in late November and/or early December) Ledger–for reasons best known to it–deposited the checks which it knew would not clear and had them re-

1. The Penna. Landlord-Tenant Act of 1951 (69 P.S. 250, 501 etc.) is involved only in regard to the merits of the case if a hearing is granted. It is referred to in the Petition as background.

turned for non-sufficient funds. When informed of the availability of funds on December 7, 1972 Ledger refused to redeposit the checks declaring its intent to drive Befwick out of possession. Befwick's checking account would prove the funds were available as indicated and Befwick is prepared to prove that the redeposited checks would have been honored by the bank.

On December 12, 1972 Ledger caused a writ of possession to issue which was served on Befwick or December 18, 1972. Befwick's counsel prepared a Petition under Pennsylvania Procedural Rule 3162 to stay execution (Pa3) averring among other grounds the tender of the funds due (Paragraph 7) and the substantial windfall to Ledger which the latter would receive because of Befwick's investment of $100,000.00 to modernize this old building's interior (Paragraph 8). With prior notice to Ledger the Petition was taken directly to the Motion Judge (Hirsh) on December 29, 1972.

Judge Hirsh orally told the parties that a meeting should be scheduled after January 1, 1973 and all proceedings to stay meanwhile. The meeting took place on January 9, 1973 in the Judge's chambers and without a Record. At that meeting, Ledger handed the Judge an Answer to the Petition which admitted the modernization of the interior of the premises but which placed everything else in issue. Ledger requested an immediate decision on the pleadings but Befwick objected and insisted on its right to a hearing—depositions as was its right under Pennsylvania Procedural Rules 3162 and 209 (Pa23).

Judge Hirsch put aside any decision on the merits of the legal and equitable issues involved and, instead, plunged immediately into settlement discussion. A proposal was made by the Judge to both parties. Ledger's counsel requested an opportunity to contact its client in

Massachusetts and the matter was adjourned—all proceedings still stayed. Later that day, Ledger contacted the Judge and Befwick and requested a meeting of the parties together with a representative of Ledger's Massachusett's office. Said meeting was set for January 17, 1973.

On said date Ledger's authorized representative appeared and demanded a sum of $20,000.00 (over twice the Judge's figure) before it would settle. Judge Hirsh terminated the meeting and counsel's notes indicated that the judge informed the parties that he would review the Petition and Answer and advise them of the next step to be taken. Again, all proceedings were orally stayed.

To Befwick's shock, Judge Hirsh on January 19, 1973 denied its Petition—without opinion—(Pa6) and Ledger, that afternoon, had Befwick's premises padlocked by the Sheriff despite a tender of back rent in cash by Befwick to the Sheriff and Ledger's representative. In this regard, it has been Befwick's legal argument throughout that the Pennsylvania Landlord and Tenant Act precludes eviction if rent is tendered (this would apply to the December 7, 1972 tender as well). Prior to actual eviction Judge Hirsh refused to have anything further to do with the case (blaming the Sheriff's Office for failing to accept the tender of monies on January 19, 1973) and Befwick appealed to the Superior Court of Pennsylvania.

The parties appeared before the Superior Court in March 1973 for oral argument. Befwick's brief contained the legal, equitable and procedural arguments referred to *supra*. It noted that Judge Hirsh's Memorandum, which he wrote after the appeal, did not deal with any of the basis issues. However at oral argument the Superior Court would not allow Befwick's counsel to argue said issues or to point out the material errors in Judge Hirsh's Memorandum (*i.e.*, there never was a hearing prior to the

issuance of the consent decree as he states; nor did the Court make the findings which form said decree as he stated. The Judge merely signed the document prepared by the parties to make it a consent decree).

The basis of the Superior Court's refusal to allow oral argument was the absence of a Record to support factual averments. Befwick's counsel stated that this was an objective of the appeal—to get a hearing. The Judges indicated they understood the problem—two justices indicating orally that a hearing should have been granted—and counsel was ordered to sit down.

On May 17, 1973 Befwick was again stunned by a per curiam Order—without opinion—denying the appeal (Pa2) but not adopting the opinion of the lower court (for obviously good reasons since it ignored the basic issues and stated other facts erroneously as outlined *supra*).

Befwick assumed that the Court had somehow erred and filed a prompt Petition for Reargument (Pa9) setting forth that the Court had cut off oral argument by Befwick's counsel precisely because of the lack of Record and had indicated that it understood the problem, two justices indicating that a Hearing was proper (Paragraph 5). Befwick also delineated the result of this type of decision *i.e.*, there would be no decision on the applicability of the Landlord and Tenant Act by reason of the tender and no decision on the equities (Paragraphs 3-4 and 7). Befwick also cited *Universal Builders Supply Inc. v. Shaler Highlands Corp.*, 405 Pa. 259 which paralelled the subject case and in which the Pennsylvania Supreme Court had sent the case back for a hearing. Ledger filed a short Answer to this Petition (Pa14) which Answer did not deny what happened before the Superior Court at oral argument.

Again, without opinion or denial of the accuracy of Befwick's assertions of what happened at oral argument, the Superior Court on June 1, 1973 denied the Petition for Reargument per curiam (Pa15). Befwick filed a prompt Petition for Allocatur (Pa16) setting forth the legal and equitable issues not dealt with by the lower courts (Paragraphs 3, 5, 6, 7 (a) (b), 8), the lack of procedural due process in failing to give a hearing, allow oral argument and the absence of a reasoned opinion to help Befwick's shareholders understand why they were being ruined and Ledger deserved a windfall of $100,000.00 (Paragraphs 4, 5, 6, 7 (c), 8). Ledger again responded with a short Answer (Pa21) which never denied the procedural events before Judge Hirsh or the Superior Court.

On October 23, 1973 the Petition for Allocatur was granted (Pa22). Since the matter was one of judicial discretion to grant or deny it seemed obvious that the Supreme Court recognized the material importance of the procedural, legal and equitable issues raised.

In April 1974 the parties had oral argument. Befwick submitted a brief which conformed to the one before the Superior Court and to the arguments set forth in the Allocatur Petition. There is no record of oral arguments made in either the Superior or Pennsylvania Supreme Court. By July 1975—15 months later—Befwick was still awaiting a decision. On July 28, 1975 counsel wrote the Court for a status check. The letter was never answered but on October 3, 1975—18 months after oral argument—the Supreme Court of Pennsylvania issued a per curiam "Order Affirmed," without opinion, on a matter it had two years earlier deemed worthy of review because of the issues presented! (Pa1). Befwick appealed to This Honorable Court.

HOW FEDERAL QUESTIONS ARE PRESENTED

On January 9, 1973 Befwick's counsel during the conference with Judge Hirsh stated with all parties present that Befwick wished the opportunity for a hearing (depositions would follow under *Rule* 209). The Judge ordered all proceedings to stay. Since such judicial conferences do not have a Court Reporter present the events are not recorded. However, Befwick raised the due process issue (*i.e.*, lack of a hearing or chance to amend) before the Superior Court in its brief on pages 10-11 (Pa25). The said facts were also pointed out to the Superior Court at oral argument (before counsel was ordered to cease argument) as is set forth in Paragraphs 4, 5 and 7 (c) of Befwick's Petition for Allocatur, which was not denied by Ledger in its response (Pa16 and Pa21). Befwick also asserted said facts in its brief to the Supreme Court of Pennsylvania on page 3 (Pa29, 30) and Ledger never denied same in its responsive brief.

Additionally, Befwick set forth the denial of oral argument before the Superior Court in Paragraph 5 of its Petition for Reargument (Pa11) and Ledger's Answer does not deny the facts (Pa13). Finally, the Petition for Allocatur [Paragraphs 5 and 7 (c)] and the brief to the Pennsylvania Supreme Court clearly set forth the problems of lack of hearing and opportunity to amend, lack of an opportunity to argue before the Superior Court and the lack of a reasoned opinion from the lower courts (Pa27 *et seq.*).

There are no Opinions on the legal, equitable and procedural issues raised by Befwick as this case passed through the Pennsylvania judicial system because Judge Hirsh ignored them and the Pennsylvania Superior and

Supreme Courts (despite the latter's grant of Allocatur) refused to state any. It is undeniably clear that Befwick's appeal to this Honorable Court raises substantial Fourteenth Amendment questions which in the interest of a fair administration of the courts and the law must be decided—and the problems corrected—by this Honorable Court.

REASONS FOR GRANTING THE WRIT

The foundation of America's rule of law is the opportunity for a full and fair hearing coupled with a reasoned opinion explaining the ruling of the Court (trial or appellate level): *Board of Regents of State Colleges et al. v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548, 92 S. Ct. 2701 (1972); *Goldberg v. Kelly et al.*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S. Ct. 1011 (1970); *Silver et al. v. New York Stock Exchange*, 373 U.S. 341, 10 L.Ed.2d 389, 83 S. Ct. 1246 (1963); *Willner v. Committee on Character and Fitness et al.*, 373 U.S. 96, 10 L.Ed.2d 224, 83 S. Ct. 1175 (1963); *Morgan et al. v. U.S.A. et al.*, 304 U.S. 1, 82 L.Ed. 1129 (1937); *Abbott v. Thetford*, 354 F. Supp. 1280 (M.D. Alabama N.D., 1973); *Johnson v. Angle et al.*, 341 F. Supp. 1043 (D.C. Nebraska, 1973); *Sims et al. v. Juras et al.*, 313 F. Supp. 1212 (D.C. Oregon, 1969). Your Petitioner, Befwick, has been denied both of these fundamental rights.

I. *Failure to obtain a hearing*

It is an established principle of law that corporations are persons under the Fourteenth Amendment insofar as the right to due process and equal protection of the law: *Grosjean v. American Press Co., Inc. et al.*, 297 U.S. 233, 80 L.Ed. 660 (1935); *Louis K. Liggett Co. et al. v. Lee et al.*, 288 U.S. 517, 77 L.Ed. 929 (1932).

Befwick was served with a writ of possession based on a consent agreement filed with the Court and rubberstamped by it on November 14, 1972. Nothing in said agreement nullified or waived protection granted by the Pennsylvania Landlord and Tenant Act and/or the equitable powers of the Courts under Pennsylvania Rule of Procedure 3162. Under Pennsylvania law a consent decree is not a judgment by the Court but is binding upon the parties: *Shaler Highlands Corp., supra.*

Befwick has never denied that it did not meet the payments scheduled in the decree (November 24 and December 1, 1972) but it has attempted to obtain a hearing where it could explain that its failure was not in bad faith and its tender of monies by December 8, 1972 (four days before the writ of possession was requested by Ledger) under Pennsylvania law was a *de minimus* delay, and/or legally compelled Ledger to cease its attempts at ejectment (under the Landlord and Tenant Act).

Befwick filed its Petition to set aside and/or stay enforcement of the writ under Pennsylvania Procedural Rule 3162 (Pa23). Said Rule provides that a writ can be stayed and/or set aside upon a showing of a right to a stay under the provisions of an Act of Assembly [3162 (a) (3)]; or upon showing any other legal or equitable ground [3162 (b) (2) and 3162 (d) (3)]. In short, Befwick had a right under Pennsylvania law to a hearing to prove one or more of the aforesaid reasons for a stay.[2]

Befwick, in accordance with its burden, was prepared at a hearing to show that the Landlord and Tenant Act, 69 P.S. 250.501, 504 allowed Befwick to nullify the writ of possession by the tender of rent on December 8, 1972 (and the later tender on January 19, 1973 had Befwick had the opportunity to amend its Petition). Befwick was also prepared to prove its good faith efforts to obtain the funds, the tender on December 7-8, 1972 and the substantial windfall which would accrue to Ledger ($100,000.00 modernization of the interior of this old building) in order

2. Befwick filed its Petition directly with the Motion Judge on December 29, 1972, An Answer was not filed until January 9, 1973. Under Pennsylvania Procedural Rule 209 (Pa24) Befwick had 15 days to commence depositions from January 9, 1973. Judge Hirsh issued his decision on January 19, 1973 (Pa6) while Befwick still had time to conduct depositions. However, Judge Hirsh had orally stayed proceedings pending the outcome of settlement negotiations which further extended Befwick's time to conduct depositions. Even after settlement discussion ceased on January 17, 1973 Judge Hirsh ordered the parties to do nothing until he reviewed the Petition and Answer at which time he would advise of the next step.

to obtain equitable relief under *Rule* 3162. In these equitable arguments it had the support of Pennsylvania decisional law: *Shaler Highlands Corp., supra; Barraclough et ux v. The Atlantic Refining Co.*, 230 Pa. Super. 276 (1974).

The issues before this Honorable Court do not include the merits underlying the Petition to set aside the Writ of Possession but concern Befwick's inability to set forth its proofs at a full and fair hearing and make legal arguments thereon before the trial court and in the appellate system as a denial of due process. In this regard it is noted that even Pennsylvania decisions have supported requests for an evidentiary hearing by a prejudiced party: *Shaler Highland Corp., supra; Com. v. Schall et al.*, 6 Pa. Com. Ct. 578.

Our Federal decisions are even clearer. It will be remembered that Befwick was waiting for Judge Hirsh to give it a green light to proceed with depositions and a hearing when it learned of the adverse order of January 19, 1973. In the *Roth* case *supra* Justices Brennan and Douglas stated that it was a denial of due process of law when a litigant "received no notice and hearing of the adverse action contemplated against him." 33 L.Ed.2d at 565.

Judge Hirsh did meet with the parties and discuss settlement. But at no time did he expect the parties to present witnesses or other evidence or hear detailed argument on the merits; nor would he have allowed same since the conferences of January 9 and 17, 1973 were squeezed into a busy calendar. A hearing, to be constitutional, must include the right to present evidence, confront your opponent and argue the merits:

> "But there must be a hearing in a substantial sense. ***The officer who makes the determinations must

consider and appraise the evidence which justifies them" (*Morgan, supra.* 82 L.Ed. at 1135).

and

"***A full hearing is one in which ample opportunity is afforded to all parties to make by evidence and argument, a showing fairly adequate to establish the propriety or impropriety from the standpoint of justice and law of the step asked to be taken" (*Abbott, supra,* 354 F. Supp. at 1289).

and

"It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims" (*Roth, supra,* 33 L.Ed. 2d at 561).

The right and obligation to provide a hearing being so clear to Federal courts it is unnecessary to multiply citations. Recent cases setting forth criteria for a fair hearing (all of which Befwick never received) are: *Goldberg, supra; Sims, supra.*

The prejudice to Befwick was compounded by the Superior Court's refusal to allow argument on the facts because of a lack of a Record as was set forth in Befwick's Petition for Reargument (Pa9) and Petition for Allocatur (Pa16). To state the facts is to present a *prima facie* due process violation. Why did the Superior Court deny Befwick the right to argue because there was no Record and then deprive Befwick of a chance to obtain a Record? Since the Court refused to file an opinion that question remains unanswered to date.

II. *The right to a reasoned opinion*

The absence of a reasoned opinion, as here, is usually part of an overall claim of deprivation of due process so that the Courts merely include it in passing as a reason

for reversal. However, the problem should be evaluated on its own merits as more and more agencies and courts seem to be utilizing per curiam type decisions by reason of the volume of work thrust before them. However, this Honorable Court, other Federal Courts and at least a portion of the American Bar Association [3] have all expressed concern over the current trend which is clearly on the upswing.

It is clear that Befwick was first prejudiced by a decision of January 19, 1973 denying its petition when the Judge on January 17 had told all parties to wait while he reviewed the petition and answer to determine the next step. This decision consisting of two words "Rule denied" deprived Befwick of its timely request for a hearing and its right to take depositions under *Rule* 209.

The Memorandum Opinion which followed the appeal did not discuss the failure to allow a hearing; nor did it discuss the essential legal and equitable issues raised by the petition (Paragraphs 7-8). Additionally, it erroneously claimed that the November 14, 1972 consent decree had been a product of a judicial hearing and was based on judicial findings. Clearly, Judge Hirsh's Memorandum Opinion could not be supported on appeal and, in fact, neither the Superior nor Pennsylvania Supreme Court adopted it.

However, the Superior Court in affirming Judge Hirsh's Order (but not his opinion) failed to come up with a reasoned opinion justifying its action. It merely

3. In the October 1975 issue of the American Bar Association Journal, James N. Gardner, Esquire at page 1224 publishes his view asking the question and concluding that unpublished opinions in the 9th Circuit are a denial of equal justice. On page 1225 he notes that one opinion consisted of only eight words: "The district court's judgment of conviction is affirmed." He concludes that such an opinion is well below the standard of a reasoned opinion. Eight words are four times the amount Befwick received from the Pennsylvania Superior and Supreme Courts (the latter waiting 18 months after oral argument to so state)!

stated "Order affirmed." It similarly acted on the Petition for Reargument and the Supreme Court followed suit 28 months later.[4] In effect, the appellate courts arrived at a decision in closed session and have refused to reveal the basis therefor to Befwick. Such action is unworthy of a public body, as was discussed in the *Roth* decision, *supra*.

It is noted that in Pennsylvania the only decision defining a per curiam opinion per Black's Legal Dictionary is *Clarke et al. v. Western Assurance Co.*, 146 Pa. 561, 570. That case states that per curiam means that the Court is of one mind and since the principles have been well established the Court need not give a *detailed* opinion. However, the Court cited a per curiam decision in which an opinion was, in fact rendered, but not as long in length as the usual type opinion. Today, the Courts in general and the Pennsylvania courts in particular are utilizing per curiam decisions in great volume to avoid giving any opinion. Thus, after great expense and expenditure of time the losing party discovers that the judicial system is rendering justice by fiat instead of reason.

In the *Roth* case, Justices Brennan and Douglas in their dissenting opinion criticized the actions of a public administrative body which refused to state its reason for the firing of a public employee. The principles stated apply to Befwick's experience as well:

> "•••but where the state is allowed to act secretively, behind closed doors and without any notice to those who are affected by its actions there is no check against the possibility of such 'arbitrary action'" (33 L.Ed. 2d at 565).

4. Although the Pennsylvania Supreme Court granted Allocatur in its discretion, it is a valid legal principle that once an appeal is granted the matter is covered by Fourteenth Amendment rights which must be accorded the litigants: *Darrough v. Estelle*, 497 F.2d 1007 (5th Cir., 1974); *Trader v. State of Maryland*, 315 A.2d 528 (174).

Justice Marshall, in the same case at page 569 stated in his dissent:

> "It may be argued that to provide procedural due process to all public employees or prospective employees would place an intolerable burden on the machinery of government***. The short answer to that argument is that it is not burdensome to give reasons when reasons exist*** It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action."
>
> • • •
>
> "***It is only where the government acts improperly that procedural due process is truly burdensome and that is precisely when it is most necessary.
>
> • • •
>
> "[Citing Professor Gellhorn] It [procedural safeguards] is the best insurance for government itself against those blunders which leave lasting stains on a system of justice, blunders which are likely to occur when reasons need not be given and when the reasonableness and indeed legality of the judgments need not be subjected to any appraisal other than one's own***"

It is or should be obvious that if an administrative agency dealing with its own employees must meet due process requirements by giving reasons for its actions, the protector of due process—our judicial system—cannot be less circumspect. Did the Superior Court or Pennsylvania Supreme Court make a judgment on an erroneous belief on the facts or because of a failure to perceive all the material facts and issues? Befwick cannot tell because there was no opinion detailing either the facts, the law or the reasoning behind the decisions. Our Courts should not be able—based on logic and equity—to escape the burden of giving reasons for a decision when just that burden is placed on all other public bodies and institutions.

The case closest in point to Befwick is the *Willner* decision, *supra*. In that case the Plaintiff was denied admission to the bar after a hearing in which he was not allowed to confront his adversaries or see the adverse evidence. There were no reasons given for the denial. His appeal from said dcision was denied without opinion as was the subsequent appeal by allocatur to the highest state court. On petition to this Honorable Court, the Court ordered a hearing for lack of due process, commenting that all steps of the legal procedure from the hearing to the reasoned decision on appeal were necessary to effect due process of law:

> "•••The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as the beginning and intermediate steps" (10 L.Ed. 2d at 231).

In a separate but concurring opinion Justices Goldberg, Brennan and Stewart were even stronger in their condemnation of the abuse of process:

> "Moreover, at no point are we or the petitioner specifically advised by any finding of the committee or of the state courts as to the precise basis of denial to him of either his original or renewed application for admission or his request for reconsideration thereof.
>
> • • •
>
> "•••The net result to me, therefore, is that the case, whatever it started out to be, has become one in which due process requires either de nova consideration of the petitioner's application or an orderly sorting out of the issues and an articulated and constitutionally ground decision on the merits of the petitioner's claims to admission" (10 L.Ed. 2d at 233).

Other cases holding that a reasoned decision is part of due process rights are: *Goldberg, supra* (at 25 L.Ed.2d at

301); *Silver, supra; Morgan, supra* (82 L.Ed at 1133); *Johnson, supra; Sims, supra.*

As a final point it is noted that because there was no hearing and no reasoned decision Befwick was functionally denied the right and opportunity to amend the Petition to allege further facts had the Court mentioned the absence of such facts as the basis for denial of the claim. The right to amend initial pleadings is basic in Pennsylvania: *Snopassky v. Baer,* 439 Pa. 140. Said decision was cited to the Courts but to no avail as neither deigned to explain the basis of the denial.

CONCLUSION

Was there a legal tender on December 7-8, 1972 and, if so, did it stay the ejectment as set forth in the Landlord and Tenant Act as a matter of law? If not, why not? In what way was Ledger prejudiced by the *de minimus* delay in payment and why should it gain a $100,000.00 windfall? Is Equity helpless to intervene and, if so, what is the meaning of *Rule* 3162 and the *Shaler Highlands Corp.*, decision *supra*? Why was Befwick denied the opportunity to present a case under 3162, especially in light of *Rule* 209 and long established due process precedents under both state and Federal law? Why did the Superior Court deny Befwick the right to argue, two justices orally stating that a hearing was required, and then deny the appeal per curiam, without opinion? Why did the Supreme Court of Pennsylvania make Befwick one of the very few civil cases granted Allocatur and then wait 18 months after oral argument to file a per curiam denial, without opinion?

To ask the above questions is to summarize Befwick's case for a writ of certiorari. Befwick had no chance to demonstrate its equitable position, argue its view of the law and/or amend its Petition to conform to criteria set forth in a judicial opinion. Obviously, Befwick had no opportunity to challenge the basis for any of the decisions. Justice Marshall in his dissent in the *Roth* case *supra* expresses Befwick's point of view:

> "It might also be argued that to require a hearing and a statement of reasons is to require a useless act*** Perhaps this is so, but a requirement of procedural regularity at least renders arbitrary action more difficult. Moreover, proper procedures will surely eliminate some of the arbitrariness that results not from malice but from innocent error. 'Experience teaches *** that the affording of procedural safe-

> guards which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring! *Silver v. New York Stock Exchange*, (cited *supra*). When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful and correct" (33 L.Ed. 2d at 569).

Befwick has cited ample decisional precedent in support of its claim for (1) a hearing, and, (2) reasoned opinions by the courts denying its appeals. The questions raised in the Petition for Writ of Certiorari are of great concern to lawyers and courts nationally as is evidenced by the A.B.A. Law Journal article set forth *supra* in footnote 3.

The surest way of encouraging non-reasoned judicial decisions is to allow this pernicious development of per curiam orders to proliferate. No one questions the right of a Court to adopt a lower court opinion—if adequate—or refer the parties to a reasoned opinion previously published. Nor does your petitioner challenge the right of a Court to deny an appeal based on its discretion (allocatur, Writ of Certiorari) without opinion. However, in all matters where the case is before the Court as a matter of right and/or after the Court accepts jurisdiction the parties should be entitled to a reasonable judgment as part of their rights under due process of law.

For the foregoing reasons, Befwick respectfully requests that this Honorable Court grant its Petition for a Writ of Certiorari to the Pennsylvania Supreme Court.

Respectfully submitted,

/s/ Paul Auerbach,
PAUL AUERBACH
Attorney for Petitioner

APPENDIX

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

JANUARY TERM, 1974

No. 107

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY t/a THE PUBLIC LEDGER BUILDING

vs.

BEFWICK OF PHILADELPHIA, INC.,

Appellant.

ORDER

(Filed October 3, 1975)

PER CURIAM

Order affirmed.

MR. JUSTICE ROBERTS would dismiss the appeal as improvidently granted.

ORDER

Massachusetts Mutual Life Insurance Company, t/a the Public Ledger Building v. Befwick of Philadelphia, Inc., appellant. Superior Court of Pennsylvania. May 17, 1973. Rehearing Denied June 1, 1973.

Appeal No. 555, October Term, 1973, from the Order of the Court Common Pleas, Trial Division, Law, of Philadelphia County at No. 663 July Term, 1972; Ned L. Hirsh, Judge.

David Freeman, Paul Auerbach, Philadelphia, for appellant.

Jerome A. Hoffman, A.C.F. Finkbiner, II, Philadelphia, for appellee.

Before WRIGHT, President Judge, and WATKINS, JACOBS, HOFFMAN, SPAULDING, CERCONE and SPAETH, JJ.

PER CURIAM.

Order affirmed.

PETITION FOR RULE TO SHOW CAUSE WHY WRIT OF POSSESSION SHOULD NOT BE STRICKEN

TO THE HONORABLE JUDGES OF SAID COURT:

The petition of Defendant, BEFWICK OF PHILADELPHIA, Inc. respectfully represents:

1. On November 14, 1972, plaintiff and defendant entered into a stipulation of record on the basis of which a consent decree was entered, providing that the judgment previously entered in the above entitled matter should form the basis for the issuance of a Writ of Possession for premises leased by plaintiff to the defendant only under certain conditions.

2. On December 12, 1972, plaintiff filed an affidavit in accordance with said decree, alleging inter alia, that the check in payment of the rent due December 1, 1972, was returned for insufficient funds. Plaintiff caused a writ of Possession to issue on that day which was served on defendant on December 18, 1972.

3. That the decree provided that a Writ of Possession should be issued ten days after the defendant was given a copy of the affidavit containing such averment.

4. That defendant has never been given a copy of said affidavit.

5. The lease provides for the operation of a restaurant by defendant and was entered into in April of 1971.

6. Shortly thereafter, plaintiff with the intent to force defendant from premises, pursued a course of conduct calculated to harass and interfere with the customary and normal business operation of a restaurant which harassment and interference materially reduced the cash flow

of defendant and thereby resulted in difficulties in meeting scheduled rental payments. These actions consisted of:

a. Prohibiting normal and dignified advertisement of the restaurant's existence, prices and services including the posting of a simple menu in the window:

b. Failure to conduct routine and proper repairs which would allow defendant to obtain a permanent occupancy permit which has been denied by the Department of Licenses and Inspections because of the numerous violations in the plaintiff's building of which the premises are a part.

c. Reporting alleged violations by defendant (later proven untrue) to the department of Licenses and Inspections without first giving notice of said alleged defects to defendant as set forth in the lease. This has caused a loss of time by and increased the concern of defendant's management regarding the stability of its possession of the leased premises;

d. Making plaintiff's agents generally unavailable for reasonable attempts to discuss problems of mutual interest and giving contradictory instructions to defendant on how to proceed and then ignoring defendant's requests;

e. Stalling on the installation of proper alterations of the premises while requiring substantial changes in defendant's operations pertaining to the lease.

7. Despite the above, defendant made good faith efforts to obtain the funds necessary to meet the payments due under the consent decree. The money was available in defendant's bank for payment of the checks issued by the defendant at least one week before the affidavit was filed and the Writ issued. The defendant had knowledge of the same but refused to accept the money.

8. Defendant has spent in excess of $100,000 to remodel the premises it is occupying and eviction from the premises will result in loss of this sum and the bankruptcy of the defendant since the premises leased are the only place of business of the defendant.

WHEREFORE, defendant prays that the Court issue a rule directing the defendant to show cause why the Writ of Possession should not be stricken, all proceedings meanwhile to stay.

DAVID FREEMAN
PAUL AUERBACH
Attorneys for Defendant

RULE TO SHOW CAUSE WHY WRIT OF POSSESSION SHOULD NOT BE STRICKEN

AND NOW, this day of 1972, upon consideration of the within petition and upon motion of Paul Auerbach and David Freeman, Esquires, attorneys for the defendant, the Court grants a rule upon the plaintiff to show cause why the Writ of Possession should not be stricken.

Rule returnable 8th day of February, 1973, in Room 378 at 9:30 A.M. All proceedings to stay meanwhile.

Rule Denied.

/s/ Hirsh
HIRSH
J.

Dated: January 19, 1973

MEMORANDUM OPINION

This dispute began during July, 1972 when plaintiff, trading as the Public Ledger Building, confessed judgment in ejectment against defendant because defendant was in default under its lease with plaintiff. Defendant filed a Petition to Open that Judgment on July 12, 1972. This Court denied with prejudice defendant's Petition to Open Judgment on November 14, 1972 and entered an Order and Decree, with the consent of counsel for defendant and counsel for plaintiff. This Order and Decree provided that plaintiff would not seek to enforce its judgment in ejectment if defendant met certain conditions. Paragraph No. 1 of the Order set forth the first condition that defendant pay plaintiff $3,328.16 within ten days. The Order and Decree further provided that if defendant failed to comply with any element of the Order and Decree, then plaintiff could file with the Prothonotary a true affidavit to that effect and the Prothonotary in turn would be directed to issue a Writ of Possession to plaintiff. This Court's Order specifically provided that no copy of the affidavit need be given to defendant if defendant violated the conditions of Paragraph No. 1 (See page 2 of the Order and Decree). Defendant violated the condition set out in Paragraph No. 1 by making payment with a check which was covered by insufficient funds. Accordingly, plaintiff sought a Writ of Possession. This matter is before this Court on Defendant's Rule to Show Cause Why Writ of Possession Should Not be Stricken.

Defendant has failed to comply with the expressed requirements of the Order and Decree and has not denied its violation. Rather defendant alleges that it was entitled to notice of the affidavit and that it did not receive such notice. In light of the provisions of the Order and Decree of this Court as set out above, it is simply frivolous to

argue that notice of the affidavit must be given. The Order and Decree clearly provides otherwise and this Court must therefore give no weight to defendant's first contention.

Similarly this Court is not persuaded by defendant's second contention that it is the victim of plaintiff's harassment. This Court previously heard this argument during the legal proceedings which preceded the Order and Decree of November 14, 1972. By that Order, this Court denied with prejudice defendant's Petition to Open Judgment and by the Consent Decree defendant acquiesced to this action. As a result of this prior consent by defendant, it cannot now assert this prior defense in order to vitiate the terms of the prior decree to which it consented. *Baran v. Baran*, 166 Pa. Super. 532, 72 A.2d 632 (1950) and *Moore v. Deal*, 240 F. Supp. 1004 (U.S. District Court for Eastern Pennsylvania) (1965).

In effect, defendant by its consent admitted that it had no defense of harassment and in accordance with this consent, this Court now properly denies defendant's rule to show cause.

Accordingly, it is therefore

ORDERED that the Rule to Show Cause why the Writ of Possession should not be stricken is denied.

BY THE COURT:

/s/ Hirsh
HIRSH
J.

Date: March 6, 1973.

APPELLANT'S PETITION FOR REARGUMENT

To The Honorable the President Judge and Judges of the Superior Court:

The petition of Befwick of Philadelphia, Inc., appellant, respectfully represents:

1. On May 17th, 1973, this Court, by a per curiam order affirmed the order of the Court below.

That order ejected a tenant (Befwick) from its premises despite its tender of the rental arrears and despite a consequent windfall of about $100,000.00 of the tenant's investment.

2. The parties had entered into a consent decree on November 14, 1972 which required Befwick to make certain payments by November 24 and December 1, 1972. In the event of failure to do so, the landlord, hereinafter called LEDGER could proceed by writ of possession to evict. BEFWICK (it offers to prove for reasons beyond its control, *i.e.*, Scott Consumer Discount Company and an associate Bank which had previously promised the funds to Befwick by November 24 and December 1, 1972, failed to deliver same on time), was not able to tender the funds until December 8, 1972. LEDGER refused the tender and on December 12, 1972, obtained a Writ of Possession which was served on December 18, 1972. A Petition to strike the Writ was timely filed with Judge Hirsch. LEDGER filed an Answer and at a meeting in chambers with Judge Hirsch, BEFWICK requested a hearing and LEDGER a decision on the pleadings alone. Judge Hirsch rendered a decision on the pleadings and a timely appeal was taken by BEFWICK to this Honorable Court.

3. The major issues raised by the Petition to strike and this appeal were:

a.) *Equitable*—BEFWICK's Petition to strike the writ of possession recited that its delay in meeting the dates in the consent decree was not its fault (Paragraph 7), that LEDGER was harassing BEFWICK (Paragraph 6), that BEFWICK tendered the funds to LEDGER before the Writ of Possession issued (Paragraph 7) and that LEDGER stood to gain a windfall of $100,000.00 in renovation of its old premises because of a slightly late tender of rent, then amounting to under $6,600.00 (Paragraph 8).

b.) *Legal*—The tender of full arrears prior to the issuance of the Writ of Possession precluded its enforcement under the Landlord and Tenant Act of 1951 as amended (Section 504).

4. Judge Hirsch's opinion was filed after BEFWICK had sent its briefs to the printer. In it, he failed to discuss or refer to the legal issue of the tender and its relationship to the Landlord and Tenant Act. He also failed to consider his power to stay an execution for equitable grounds even though the mandate of the consent decree was not followed. Neither did the opinion mention the windfall to LEDGER or the possibility that BEFWICK could prove its good faith and effort to pay at a hearing.

The case of *Universal Builders Supply, Inc. v. Shaler Highlands Corp.*, 405 Pa. 259 unfortunately was not discussed in the brief or at argument. There the Supreme Court held that although a time period for payment in a consent decree could not be enlarged, execution of the judgment would be stayed for equitable reasons where the holder of the judgment stood to gain a windfall ("over" $40,000.00) and a tender of the payment due had been made (after execution issued—*and not before*—as in the in-

stant case). The Supreme Court held that a hearing should be ordered on the merits.

5. At oral argument (March 31, 1973), appellant's counsel began to detail the facts surrounding the reasons for the delayed tender and the tender itself. He was cut off since the facts were not in the record. Two Judges indicated that a record should be made so that the Court could judge the case on its merits. Nevertheless, the Court dismissed the appeal per curiam.

6. In its brief, LEDGER made great issue out of two of BEFWICK's checks returned N.S.F. (referring to checks issued for payments due on November 24 and December 1, 1972), denied that a legal tender was made and denied that the funds were in the bank to back up the tender. BEFWICK recognizes that such allegations on an incomplete record may have influenced the Court adversely which demonstrates why the failure of Judge Hirsch to order a hearing was so prejudicial. At such a hearing, BEFWICK would have presented convincing evidence including the following:

a.) The two checks issued by BEFWICK in reliance on promises by the lending entities to have the money in time to meet the time periods stated in the consent decree. When these promises proved erroneous, LEDGER was immediately informed, even before the checks were returned N.S.F. in fact, BEFWICK put a "stop payment" on the checks with the bank which, in turn, failed to note this on the checks. BEFWICK's President, R. Allen Bayley, is an honorable person with an excellent community reputation for religious and charitable endeavors and in no manner intended to issue checks that would not clear. When the Finances were delayed in coming, Mr. Bayley deposited his own personal funds in Philadelphia National Bank's BEFWICK Account on December 7, 1972 to cover the two checks issued by the corporation.

b.) Mr. Bayley deposited the funds in BEFWICK's Account in Philadelphia National Bank on December 7, 1972 in the late afternoon. He called David Freeman, Esq., who called Jerome Hoffman, Esq. (counsel for LEDGER), and informed him of the availability of the funds and that the checks should be redeposited. BEFWICK would also present a qualified witness from the bank to testify that had the checks returned N.S.F. been redeposited on December 8, 1972, they would have been honored. (LEDGER, in its argument that no tender was made, relies upon the fact that no *new* check was tendered.)

c.) LEDGER's argument that no funds were available (BEFWICK, in its Petition to strike the Writ of Possession served December 18, averred it had the money in the bank for at least a week before the Writ issued. BEFWICK did not realize that the Writ had issued six days before service —believing instead that issuance and service occurred the same day), would be destroyed by demonstration that the Philadelphia National Bank had the funds in the BEFWICK account on December 8, 1972 as Mr. Freeman notified Mr. Hoffman.

7. The end result of this Honorable Court's per curiam decision is to confirm an opinion of the lower court which omits reference to the two material, legal and equitable issues raised; gives LEDGER, a windfall of $100,000.00; and compels BEFWICK, a corporation with about fifty small shareholders, to lose its only operating premises and go into bankruptcy without a chance to present its evidence at a hearing. This Court did not have the benefit of this case referred to at the time of argument. It is submitted that the result has been unjust and that consideration of that case will result in changing the Court's opinion and the prevention of injustice.

WHEREFORE, it is respectfully requested that Reargument be ordered.

/s/ Paul Auerbach
PAUL AUERBACH

/s/ David Freeman
DAVID FREEMAN

Attorneys for Appellant

RESPONSE OF APPELLEE MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY TO APPELLANT'S PETITION FOR REARGUMENT

To The Honorable, The President Judge and Judges of the Superior Court:

Massachusetts Mutual Life Insurance Company opposes appellant's petition for reargument.

Appellant's petition raises no fact or argument which has not already been presented and argued to this Court in the briefs, at oral argument, or in the supplemental letters to this Court. Accordingly, Massachusetts Mutual will not burden this Court with unnecessary repetition of the prior arguments in stating its opposition to appellant's petition.

Respectfully submitted,

/s/ A. C. F. Finkbiner, III
A. C. F. FINKBINER, III

WILLIAM H. LOWERY
1600 Three Penn Center
Philadelphia, PA 19102
Attorneys for Appellee,
Massachusetts Mutual Life
Insurance Company, t/a The
Public Ledger Building

LETTER DATED JUNE 4, 1973 TO DAVID FREEMAN FROM CHARLES A. HOENSTINE

Dear Mr. Freeman:

This Court has made the following Order on the Petition filed on behalf of Appellant in the above entitled proceeding:—

"AND NOW, June 1, 1973, upon consideration of the within Petition for Reargument at Appeal No. 555 October Term, 1973, and Answer thereto, IT IS ORDERED that the said Petition be, and the same is hereby Refused.

/s/ Per Curiam"

Very truly yours,

/s/ Charles A. Hoenstine
CHARLES A. HOENSTINE
Prothonotary

CAH/erh
cc: William H. Lowery, Esq.
cc: A.C.F. Finkbiner, III, Esq.

PETITION FOR ALLOCATUR

To The Honorable, The Chief Justice and Justices of the Supreme Court of the Commonwealth of Pennsylvania: The Petition of Befwick of Philadelphia, Inc., by its Attorney Paul Auerbach, Esq., respectfully represents:

1. This case arises out of a dispute between a tenant (BEFWICK) and its landlord (LEDGER). LEDGER filed a Complaint in Ejectment in the Court of Common Pleas of Philadelphia County. The parties then negotiated a settlement which was embodied in a consent decree dated November 14, 1972. The lower Court played no part in negotiation or terms of the decree other than the pro forma signing thereof upon submission. The decree provided that BEFWICK would pay a rental of approximately $6,600.00 in two installments, one due on November 24, 1972 and the other on December 1, 1972. Thereafter, monthly rental payments would be due on the first of each month as provided in the lease. On default, LEDGER could proceed by way of a writ of possession.

2. BEFWICK did not make the initial payments on schedule because its lender, Scott Consumer Discount Company (which had promised the funds in time to meet the agreed schedule) failed to forward the money. BEFWICK's President, R. Allan Bayley, then had his personal funds transferred to BEFWICK's account in the Philadelphia National Bank, and thru counsel, notified LEDGER on December 7, 1972 to redeposit the checks (previously issued in accordance with the agreed schedule) on December 8, 1972. LEDGER refused the tender and on December 12, 1972 obtained a writ of possession.

3. BEFWICK petitioned to strike the writ of possession alleging:

a) Paragraph 7—Although pleaded generally, BEFWICK averred the tender on December 7, 1972 which under Section 504 of the Landlord and Tenant Act of 1951 (68 Pur. Stat. 250.501 etc.) rendered the writ of no effect. In fact, in the present case the tender was made even before the writ was issued.

b) Paragraphs 6, 7, 8—BEFWICK averred that the delay in meeting the scheduled payments was not its fault, that LEDGER stood to gain an inequitable windfall of $100,000.00 (BEFWICK completely modernized this old premises), that the funds were tendered before the writ issued and that LEDGER was harassing BEFWICK. In essence BEFWICK was pleading with the court to exercise its conscience and equitable powers and not permit LEDGER to gain an unconscionable windfall because of a slightly late tender of rent (the windfall would net LEDGER about $94,000.00).

4. LEDGER filed an Answer to the petition to strike at an informal meeting in chambers, which Answer denied the tender. BEFWICK requested a hearing on the legal issue of tender and the equitable issues raised while LEDGER requested that the petition be decided on petition and answer. The lower court denied the petition on January 19, 1973 without allowing BEFWICK the opportunity to amend. See: *Snopassky v. Baer,* 439 Pa. 14 on the right to amend. The writ of possession was executed that day. BEFWICK then appealed to the Superior Court (October Term, 1973, No. 555).

5. The opinion of the lower court which issued only after the appeal did not mention the tender and its relation to the Landlord and Tenant Act; nor did it refer to the windfall to LEDGER. At oral argument before the Superior Court BEFWICK's counsel was ordered by the court not to argue any facts not on record. Upon learning that there was no hearing the court was surprised; two of the judges

orally stated that a hearing was necessary to evaluate the case. Despite this, the appeal was denied per curiam thereby affirming a lower court opinion which failed to deal with the material issues.

6. BEFWICK, a new corporation with about fifty shareholders, had its sole operating premises as well as most of its capital invested in the Public Ledger Building. Because of its ejectment it faces bankruptcy while LEDGER, a wealthy corporation, stands to gain a windfall of $100,000.-00. This inequity is imposed without affording BEFWICK a hearing on the important questions or an opinion by the Superior Court explaining the rationale of its Order.

7. BEFWICK respectfully pleads that the instant petition be granted for the following reasons:

a) The important protection afforded tenants by the Landlord and Tenant Act (*i.e.*, a tender of rent nullifies the writ of possession) is totally ignored by the lower court and the Superior Court in contravention of the law and public policy of this Commonwealth. Said language in Section 504 clearly provides:

> "At any time before writ of possession is actually executed the tenant may, in any case for the recovery of possession solely because of failure to pay rent, supercede and render the writ of no effect by paying to the constable or sheriff the rent in arrears and the costs."

At a hearing BEFWICK would prove its tender to the Landlord before the writ even issued and to the Sheriff on January 19, 1973 when he attempted to and succeeded in evicting the appellant.

b) The case of *Universal Builders Supply, Inc. v. Shaler Highlands Corp.*, 405 Pa. 259 holds that although a time

limit in a consent decree cannot be extended the writ of possession will be avoided on equitable grounds where injustice (and a windfall to the party enforcing the time limitation) will result.

c) The failure to allow a hearing was substantially prejudicial to BEFWICK in that it allowed LEDGER to argue that BEFWICK had given two bad checks, had failed to make a tender and that the funds to pay the rent were never available. Had a hearing been granted President Bayley of BEFWICK could have testified to the problem with Scott Consumer Discount Company, his notification to LEDGER *in advance* of the lack of funds to meet the previously issued checks, his use of personal funds to cover said checks. David Freeman, Esquire could have testified to the discussion with counsel for LEDGER on December 7, 1972 and an officer of P.N.B. would have confirmed that the redeposit of the checks on December 8, 1972 would have been honored (LEDGER argued in its brief that there was no tender because no *new* check was issued). The importance of a hearing has been recognized before in this Commonwealth: *Com. v. Schall,* 6 Com. Ct. 578.

8. The effect of the action of the court below and the Superior Court is to nullify the provisions of the Landlord and Tenant Act with regard to tender, the decisions of this Court providing for a hearing on the merit of controversies on equitable grounds and the relaxation of requirements of consent decrees in the proper circumstances (*i.e.,* to prevent an unjust windfall).

WHEREFORE, appellant prays that it be permitted to file an appeal and argue its case before this Honorable Court.

/s/ Paul Auerbach
PAUL AUERBACH
Attorney for Appellant

CERTIFICATION OF SERVICE

The undersigned hereby certifies that on June 14, 1973 he did personally serve a copy of this petition upon counsel for the appellee at his office.

/s/ Paul Auerbach
PAUL AUERBACH

RESPONSE OF MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY TO BEFWICK OF PHILADELPHIA, INC.'S PETITION FOR ALLOCATUR

To The Honorable, The Chief Justice and Justices of the Supreme Court of the Commonwealth of Pennsylvania:

Massachusetts Mutual Life Insurance Company opposes Befwick of Philadelphia, Inc.'s petition for allocatur.

Befwick's petition raises no fact, argument, or citation of authority which has not already been presented and fully argued in the briefs, at oral argument, in the supplemental letters submitted following oral argument, and in Befwick's petition for reargument in the Pennsylvania Superior Court. Accordingly, Massachusetts Mutual will not burden this Court with unnecessary repetition of the prior arguments in stating its opposition to Befwick's petition.

Respectfully submitted,

/s/ A. C. F. Finkbiner, III
A. C. F. FINKBINER, III
WILLIAM H. LOWERY
1600 Three Penn Center
Philadelphia, PA 19102

Attorneys for Massachusetts Mutual Life Insurance Company, t/a The Public Ledger Building

Of Counsel:
Dechert Price & Rhoads

LETTER DATED OCTOBER 24, 1973 TO DAVID FREEMAN FROM PATRICK N. BOLSINGER

Dear Mr. Freeman:

Please be advised that the Court has entered the following Order on the Petition for Allowance of Appeal from Order of the Superior Court in the above captioned matter:

"October 23, 1973—Petition Granted per Curiam"

This appeal has therefore been filed in this office at No. 107 January Term 1974 and will be listed for argument at the Session commencing April 15, 1974 at Philadelphia.

Will you please have the enclosed Praecipe for Appearance signed by *opposing* counsel and returned to this office promptly for filing. Your appearance is automatically entered by the granting of the appeal, but we require the appearance of opposing counsel since it is not always the same person who appeared in Superior Court.

You are advised that the Appellant's Briefs are due sixty (60) days from today, and Briefs for Appellee are due thirty (30) days thereafter, in accordance with amended Rule 57. Briefs should be filed in accordance with Rule 49 of the Rules of the Supreme Court.

Our invoice in the sum of $9.00 is enclosed to cover the fee for filing the appeal.

/s/ Patrick N. Bolsinger
PATRICK N. BOLSINGER
Prothonotary

PNB:ejh
cc: A.C.F. Finkbinder, III

RULES OF CIVIL PROCEDURE

Rule 3162. Stay of Execution. Setting Aside Execution

(a) Execution shall be stayed as to all or any part of the property of the defendant

(1) upon written direction of the plaintiff to the sheriff;

(2) upon a showing of exemption or immunity of property from execution;

(3) upon a showing of a right to stay under the provisions of an Act of Congress or an Act of Assembly.

(b) Execution may be stayed by the court as to all or any part of the property of the defendant upon its own motion or application of any party in interest showing

(1) a defect in the writ or service; or

(2) any other legal or equitable ground.

(c) In an order staying execution the court may impose such terms and conditions or limit the stay to such reasonable time as it may deem appropriate.

(d) The court may on application of any party in interest set aside the writ or service

(1) for a defect therein; or

(2) upon a showing of exemption or immunity of property from execution; or

(3) upon any other legal or equitable ground.

(e) All objections by the defendant shall be raised at one time.

(f) After the termination of a stay, execution may proceed without reissuance of the writ. Adopted March 30, 1960. Eff. Nov. 1, 1960.

Rule 209. Duty of Petitioner to Proceed After Answer Filed

If, after the filing and service of the answer, the moving party does not within fifteen days:

(a) Proceed by rule or by agreement of counsel to take depositions on disputed issues of fact; or

(b) Order the cause for argument on petition and answer (in which event all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted for the purpose of the rule); the respondent may take a rule as of course on the moving party to show cause why he should not proceed as above. If after hearing the rule shall be made absolute by the court, and the petitioner shall not proceed, as above provided, within fifteen days thereafter, the respondent may order the cause for argument on petition and answer, in which event all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted for the purpose of the rule. Adopted Sept. 8, 1938. Eff. March 20, 1939.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUPERIOR COURT BRIEF OF APPELLANT

THE FAILURE TO GRANT A HEARING DEPRIVED BEFWICK OF ITS CONSTITUTIONAL RIGHTS UNDER PERTINENT PROVISIONS OF THE FEDERAL AND PENNSYLVANIA CONSTITUTIONS AND WAS CONTRARY TO THE RULES OF PROCEDURE OF THIS COURT AND ITS DECISIONS

(Statement of Questions Involved Nos. 2, 3 and 4)

It being clear that the averments in the rule were sufficient to sustain the setting aside of the writ of possession on legal and/or equitable grounds a hearing on the averments should have been allowed as set forth in Rule 3162. If the petition was sufficient in allegation, a period of time should have been granted to allow amendment (*Snopassky v. Baer et al.*, 439 Pa. 14 1970). The lower Court denied the petition without comment, so it must be assumed that the averments were adequate and the decision based on an adverse finding of law.

Without burdening this brief with citations it is clear hornbook law that the taking of property without due process of law (*i.e.*, a hearing) is a violation of the federal constitution (Article 14) and our Pennsylvania constitution (Section 11). There can be no due process without a hearing at which the facts can be presented to an impartial tribunal.

Furthermore, in *Commonwealth v. Schall*, 6 Commonwealth Ct. 578, it was held that the failure to allow a hearing on a preliminary injunction (which is similar to Befwick's request that the writ of possession be set aside) was an abuse of discretion even though a hearing on the merits was scheduled. In the instant case the court refused even a hearing on the merits.

Wherefore, it is respectfully requested that this Honorable Court remand the case to the lower court with instructions to proceed with a Hearing on the merits with costs assessed against the Appellee on this appeal.

Respectfully submitted,

PAUL AUERBACH,
DAVID FREEMAN,
Attorneys for
Defendant-Appellant

SUPREME COURT BRIEF OF APPELLANT

STATEMENT OF QUESTIONS INVOLVED

1. Does tender of rent for which an ejectment action has been brought in the Court of Common Pleas, preclude the issuance or execution of a writ of possession in that action by virtue of the provisions of the Act of April 6, 1951, P.L. 69, Art. V, Sec. 504, 69 P.S. §250.504?

(Not discussed by either of the lower courts.)

2. Does the common law forbid the issuance or enforcement of a writ of possession in such action, where the rent is tendered before the issuance or the writ or its enforcement?

(Not discussed by either of the lower courts.)

3. Did the lower court err in refusing to exercise discretion to relieve against a forfeiture causing great hardship, where there is substantial but not technical compliance with its own decree and equitable considerations require such relief?

(Answered in the negative by the courts below.)

4. Did the lower court err in deciding the instant case solely on petition and answer over appellant's objection thereby depriving appellant of a hearing in a case where the petition and answer demonstrate a material dispute on the essential issues of tender and equitable considerations?

(Answered in the negative by inference.)

5. Did the lower court err in deciding the instant case on petition and answer over appellant's objection without allowing appellant the opportunity to amend?

(Not discussed by the lower court.)

HISTORY OF THE CASE

This appeal from the denial by the lower court, without an evidentiary hearing or an opportunity to amend, of appellant's rule to show cause why a writ of possession should not be set aside.

Plaintiff-appellee (hereinafter Mutual) leased a portion of its premises in an office building to defendant-appellant (hereinafter Befwick) for the operation of a restaurant. Befwick spent approximately $100,000 in repairs and improvements. Mutual waived the usual escrow in consideration of this investment.

The relationship between the parties deteriorated. Mutual seized upon a delay in rental payments and entered judgment via amicable action in ejectment as provided by the lease. Befwick countered with charges that Mutual had misled it and petitioned to open. Substantial discovery was taken but before a hearing on the merits was scheduled, the parties compromised their respective positions and placed them on the record through a consent decree dated November 14, 1973 (R. 21a23a).

The decree entered judgment but suspended enforcement so long as defendant met a schedule of rental payments. Upon failure, plaintiff had the option of issuing a writ of possession.

As set forth in Befwick's petition, its brief and pleadings, the initial rental payments due on November 24 and December 1, 1972 were delayed because Befwick's lender (Scott Consumer Discount Co.) failed to provide the funds as promised. The checks issued in anticipation of the funds were not honored. Befwick's president promptly obtained the necessary funds from his own assets and deposited them (See statement of P.N.B. appended to the record). Befwick's counsel informed Mutual's counsel of

the availability of the funds and advised that the checks would be honored on redeposit. Mutual refused the tender (claiming it wanted possession only) and on December 12, had a writ of possession issued (Served December 18, 1972).

Befwick promptly filed a petition to set aside the writ (R. 24a-26a). Fearful that the writ would be enforced while depositions were being scheduled, counsel attached a proposed order staying proceedings and the matter was brought before Judge Hirsh in Chambers. The petition set forth the tender and the huge investment that would be lost if the court did not exercise its equitable powers under Pennsylvania Procedural Rule 3162. Mutual filed an answer (R. 27a-29a) specifically denying a tender (thereby putting it at issue), claiming no knowledge of improvements (again a contested issue) and made a general denial of all other averments. Mutual then asked Judge Hirsh to decide the case on petition and answer only, thereby precluding an evidentiary hearing. Befwick objected; but the court on January 19, 1973, discharged Befwick's rule without an opinion (at that time) and without leave to amend.

Befwick was ejected from the premises that day despite a cash tender to the sheriff at the time of his arrival. Befwick took a timely appeal to the Superior Court. At oral argument, at least two Justices expressed surprise that there had been no evidentiary hearing. Counsel for Befwick was informed that he could not argue the merits because there was no record and that the court understood the problem.

To counsel's dismay, the Superior Court in a per curiam opinion, then sustained the decision of the lower court, which opinion failed completely to discuss the material issues of tender and equity. A petition was filed with this Honorable Court which granted allocatur.

SUMMARY OF ARGUMENT

Pennsylvania law specifically allows the court to set aside a writ of possession for equitable and/or legal reasons.

Both the Landlord and Tenant Act and Pennsylvania common law require the court to set aside a writ of possession issued after a tender of the rent. The Act goes further and precludes enforcement of a writ of possession even though a forfeiture has occurred and the writ was issued, if tender is made before execution. The Act applies to all actions in ejectment for nonpayment of rent regardless of forum. This is apparent from its own language and the well known presumptions that the Legislature would not intend an absurd result. An action in ejectment filed in the Court of Common Pleas is subject to the general principles of the Act as is an action filed in Municipal Court.

The existence of the consent decree did not alter the situation. It merely gave the landlord the option to have the writ issued under certain circumstances. The decree was not intended to operate automatically nor did it waive any of the tenant's rights under the Act relevant to the execution or staying enforcement of a writ of possession.

The lower court's failure to allow an evidentiary hearing, over appellant's objection, violated due process of law under both the Federal and Pennsylvania Constitutions and further conflicts with the decisional law of this Commonwealth. The decision to deny the appellant's petition on petition and answer without leave to amend was also in violation of the decisional law of Pennsylvania. Since the lower court did not discuss the material issues of tender or equity (loss of investment) in its Opinion, remand of this case is necessary to effectuate a just result.

ARGUMENT

1, 2. The Landlord and Tenant Act and the decisional law of our Commonwealth permits the setting aside of a writ of possession where there has been a valid tender.

Paragraph 7 of Befwick's Rule avers the tender which under Section 504 of the Landlord and Tenant Act of 1951 (68 Pur. Stat. 250.501 etc.) rendered the writ of possession void. The Act is as follows, Section 250.504:

> "*At any time* before any *writ of possession* is actually executed, the tenant may, *in any case*, supercede and render the writ of no effect by paying to the constable or sheriff the rent actually in arrears and the costs." (Emphasis supplied)

The tender in issue occurred even before the writ issued, let alone before the time of execution. Had Befwick been allowed to present evidence in the lower court, this fact could have been proved. Furthermore, although not before this Court at this time, Befwick did tender rent and costs to the sheriff and Mutual on January 19, 1973 (when the writ was enforced), but both refused the tender.

Mutual has argued in the past that the Landlord and Tenant Act applies only to actions in the Municipal Court. However, the Act refers to "any writ of possession" in "any case." Mutual's restrictive interpretation is rebuffed by the Rules of Statutory Construction which provide that the Legislature does not intend an absurd result, i.e., this elaborate piece of remedial and humane legislation can not be thwarted by spending a few extra dollars and filling in Common Pleas instead of the Municipal Court.

Additionally, the consent decree makes clear that the rights under the Landlord and Tenant Act were not waived. On the contrary, the decree merely sets forth certain conditions which, if met, allowed Mutual, at its

option, to issue a writ of possession. Again, it is noted that the consent decree was formulated by the parties without judicial intervention except the pro forma signing of the order.

Turning to the common law we find numerous decisions which hold that agreements between the parties calling for forfeiture in the event of default, are not automatic and the party claiming the right of forfeiture must act before a valid tender is made. *Craig v. Cosgrove,* 277 Pa. 580; *McKean Natural Gas Co. v. Wolcott,* 254 Pa. 323; *Caliciente v. Central Motors, Inc.,* 115 Pa. Superior Ct. 74.

Befwick relies more heavily on the Act than on common law. However, given the history of negotiation preceding the consent decree and the absence of judicial intervention, there is no reason for the court to overlook the obvious analogy between the situations in the common law and the instant case.

This vital issue of tender was not even discussed in Judge Hirsh's opinion. Mutual, on the other hand, recognizes the importance of the issue and argued it in its brief before the Superior Court. In order to understand the tender issue, Mutual's position must be discussed.

Befwick asserts that if given a hearing, it can prove that its counsel on or about December 7, 1972 (five days before the writ issued) informed Mutual's counsel that the funds to support the checks earlier dishonored by the bank, had been provided by Befwick's President, and that the checks would be honored if deposited. A statement by Befwick's bank (P.N.B.) has been attached to the record and supports the existence of the funds. (The back rent on December 8, 1973 amounted to just under $6600.00). Mutual refused the tender saying that it wanted Befwick out. The cases hold that once Mutual's negative position was clear, Befwick was under no obligation to make further

useless tenders. *Seligson Appeal,* 410 Pa. 270 at 279; *Com. v. Gerlach,* 399 Pa. 74. *Phillips v. Tetzner,* 357 Pa. 43; *Shattuck v. Cunningham* et al, 166 Pa. 368, 381.

Mutual's response is to deny the tender (again demonstrating the necessity of a hearing). It starts out by taking advantage of counsel's error in formulating the petition to set aside the writ. The writ was served on December 18, 1973 and counsel in his petition (assuming erroneously that such a writ would be served the same day as issued), stated that the money was available one week before the writ issued. As it turns out, the writ issued on December 12, 1972 and was not served until December 18. Mutual took the December 12 date to show that there were no funds in the account on December 4. However, as set forth in Befwick's brief, Befwick has never denied that there were no funds, until counsel advised Mutual. The P.N.B. statement bears out the availability of funds at least one week before December 18.

Next, Mutual states that if in fact it was advised about the availability of the money, this is not tender, citing the case of *English v. Yates,* 205 Pa. 106. There, the debtor merely showed the creditor a bank book and said the money was available. Befwick did more than that. Befwick had issued checks in Mutual's possession and the money was in the checking account. Mutual was requested to redeposit the checks for payment. Befwick is prepared to offer in evidence testimony by P.N.B. officials that a previously dishonored check will be honored if resubmitted and there are funds in the account.

Mutual then says that the money was tendered too late because it was beyond the time limit set forth in the consent decree. Mutual here attempts to assert that the consent decree is an order not subject to equitable considerations. This is contrary to the position of this Court

in *Universal Builders Supply Inc. v. Shaler Highlands Corp.*, 405 Pa. 259, which holds precisely that the writ of possession can be set aside for equitable reasons despite the existence of strict time limits in a court order. In that case, this Court noted that a consent decree is not a legal determination by the court but a contract between the parties or their Counsel and the attempt to describe Befwick as defiant of a court order must fail.

In summary, the tender issue is material and Befwick should be allowed a hearing.

3. Equity abhors an unjust forfeiture and will not allow a party to advantage itself by its own wrongs.

Befwick is entitled to equitable relief because (1) Mutual refused a valid tender of rent prior to issuance of a writ of possession and prior to execution thereof; (2) Mutual will gain a windfall of $100,000 worth of improvements to the premises because of its wrongful acts.

The refusal to accept a valid tender has been discussed in the previous section.

It is clear from the case of *Universal Builders Supply Inc. v. Shaler Highlands Corp.*, 405 Pa. 259, that this Court should not permit Mutual, a multimillion dollar enterprise, to gain a $100,000 windfall because of a minor deviation from the consent decree. This windfall is described in Sections 6, 7 and 8 of the rule and petition to set aside the writ. Judge Hirsh does not discuss this issue at all in his Opinion. Befwick remodeled the premises (which were vacant for some time previous to its tenancy) at the cost of $100,000 and the landlord admitted the value of the remodeling by waiving escrow. The back rental amounted to just under $6,600 and was tendered within a short time after the scheduled deadline of December 1, 1972.

The instant case is a stronger case for the exercise of equity relief than *Shaler, supra.* In that case, a mortgager consented to a decree requiring him to pay $29,000 in 60 days. The mortgagor could not meet the 60 days and the mortgagee foreclosed. This Court, nevertheless, noted that by allowing the mortgagee to prevail it would receive a $40,000 profit. This Court felt that a hearing should be granted to determine the equities and said that there was no magic in the 60 limitation i.e., it could be extended if equitable.

Befwick asserts that it tendered the money shortly after the deadline while in *Shaler,* there was no tender one month after the deadline. Furthermore, the court felt a $40,000 windfall was unreasonable in *Shaler* while the instant case involves a $100,000 winfall. The analogy to *Shaler* is clear. Befwick is entitled to a hearing to establish its claim to equitable relief.

4. The petition raised certain factual questions which if proven were of substantial legal consequence and therefore, a refusal to allow evidence to be taken deprived appellant of his constitutional and legal rights.

Befwick is a small corporation with about 50 small shareholders who stand individually to lose a significant amount of money by reason of Befwick's action. Yet, despite this, Judge Hirsh, over Befwick's objection, refused the petition solely on petition and answer, thereby precluding Befwick from a hearing.

As noted by Befwick in its petition for allocatur and in its brief before the Superior Court, the failure to have a hearing precluded proof of (1) the tender—which is a serious question under the Landlord & Tenant Act; (2) the extent of the windfall to Mutual.

Proof would include testimony by R. Allen Bayley, President of Befwick, as to his good faith efforts to ob-

tain the funds from Scott Consumer Discount Company, who promised same in conformance to the decree of November 13, 1972, but then reneged. Mr. Bayley will testify to his use of personal funds to meet the checks, the funds being deposited on December 7, 1972, in the Wilkes Barre area and credited on December 8, 1972, as shown on the P.N.B. statement. He could also testify as to his relations with Mutual; the improvements on the premises of permanent value to it; and to his lack of intent to issue checks in November which would be dishonored. (Actually notice was given Mutual of the lack of funds as soon as the transaction with Scott Consumer Discount fell through).

Befwick would also adduce David Freeman, Esquire, who can testify to the tender and an officer of P.N.B. to testify to their procedures in honoring previously dishonored checks where new funds are placed in the account and the checks redeposited.

This Court in *Shaler* noted the elemental right to a hearing to prevent a windfall. In *Com. v. Schall,* 6 Pa. Comwlth. Ct. 578, a failure to grant a hearing on a preliminary injunction was held to be an abuse of discretion, despite the fact that there would be a hearing on the permanent injunction. Befwick was entirely deprived of a hearing. Such a deprivation in the absence of a conclusive case against Befwick (clearly not present here especially where the lower court fails to mention or discuss the basic legal and equitable issues) deprives it of constitutional rights of due process.

5. The determination of the matter before the lower court on petition and answer over objection without leave to amend is in violation of Pennsylvania law.

This Court has held that it is clearly a matter of right that a petitioner, barred a hearing on the initial pleadings

alone, should have a right to amend. *Snopassky v. Baer*, 439 Pa. 14. The lower court disregarded this basic right; issued no opinion until after appeal; and then failed to refer to the basic legal and equitable issues raised by the petition. This right to amend is vital to persons prejudiced by a dismissal without hearing and should not be disregarded by the lower court.

If the case is sent back to Judge Hirsh, Befwick would amend the petition to include the tender on January 19, 1973 (before enforcement of the writ) to Mutual and the sheriff of Philadelphia County. Additionally, if this Honorable Court finds that the petition, as it stands, is defective but capable of cure if amended, Befwick should be allowed to do so under the *Baer* decision.

It is, therefore, submitted that the judgment of the court below should be reversed and the case be remanded for proceedings on the petition and answer.

Respectfully submitted,

PAUL AUERBACH
DAVID FREEMAN
Attorneys for Appellant

INDEX TO BRIEF.

	Page
QUESTIONS PRESENTED	1
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT	5
I. The Fourteenth Amendment Does Not Require Leave to Amend or an Evidentiary Hearing Where There Are No Disputed Issues of Fact and a Party Is Not Entitled to the Relief Sought as a Matter of Law	5
A. Pennsylvania Law Did Not Provide for a Tender	6
B. Court Orders Must Be Complied With	6
C. There Were No Issues of Fact	8
II. The Fourteenth Amendment Does Not Require an Appellate Court to File an Opinion Articulating Its Reasons for a Per Curiam Affirmance	9
CONCLUSION	11

TABLE OF CITATIONS.

Cases: Page

Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U. S. 308 (1968) 10
Baran v. Baran, 166 Pa. Superior Ct. 532, 72 A. 2d 623 (1950) 7
Barraclough v. Atlantic Refining Co., 230 Pa. Superior Ct. 276, 326 A. 2d 477 (1974) 7
Universal Builders Supply, Inc. v. Shaler Highlands Corp., 405 Pa. 259, 175 A. 2d 58 (1961) 7
Zampetti v. Cavanaugh, 406 Pa. 259, 176 A. 2d 906 (1962) .. 7

Statutes:

Pennsylvania Landlord and Tenant Act, Act of April 6, 1951, P. L. 69, Art. V, §§ 501-511, 68 P. S. §§ 250.501-511 6

Rules and Constitutions:

Fed. R. Civ. P.:
12(c) 9
56 9
Pennsylvania R. Civ. P.:
1034 9
1035 9
Pennsylvania Supreme Court Rule 52 10
United States Constitution, Fourteenth Amendment 1, 4, 5

QUESTIONS PRESENTED.

1. Were the Pennsylvania Superior and Supreme Courts correct in affirming per curiam the trial court's decision to deny a petition to strike a writ of possession, without leave to amend or an evidentiary hearing, where there was no legal basis for petitioner's claim and no issue of fact?

2. Does the Fourteenth Amendment permit the Pennsylvania Superior and Supreme Courts to affirm the decision of a trial court without rendering detailed opinions?

COUNTER-STATEMENT OF THE CASE.

This case involves two corporations, Petitioner Befwick of Philadelphia, Inc. (hereafter "Befwick") and Respondent Massachusetts Mutual Life Insurance Company (hereafter "Massachusetts Mutual"), and Befwick's ejectment from the Public Ledger Building, owned by Massachusetts Mutual, after Befwick failed to comply with an Order and Decree entered by the trial court.

On April 1, 1971 Massachusetts Mutual and Befwick entered into a commercial lease whereby Massachusetts Mutual rented space in the Public Ledger Building to Befwick (R at 5a).[1] Thereafter, on July 6, 1972, Massachusetts Mutual obtained a judgment in ejectment under the lease for Befwick's failure to pay rent and for other defaults, all constituting breaches of conditions of the lease (R at 2a-4a). Befwick then filed a petition to open the judgment (R at 16a) and took four depositions on the merits of the petition to open.

On November 14, 1972 the trial court (Hirsh, J.) denied with prejudice Befwick's petition to open the judgment and entered an Order and Decree, with consent of counsel for both parties (R at 21a). The Order and Decree provided that Massachusetts Mutual would not enforce its judgment in ejectment if Befwick complied with several conditions enumerated in the Order and Decree. The Order and Decree directed the Prothonotary of the trial court to issue a Writ of Possession to Massachusetts Mutual in the event that any condition of the Order and Decree was not met by Befwick (R at 22a-23a). The first condition of the Order and Decree directed Befwick to pay Massachusetts Mutual all back rent within ten days (R at 21a).

1. Citations to petitioner's appendix are referred to by "P" and the appropriate page numbers (*e.g.*, "P at 1a"). Citations to the Record in the court below (Pennsylvania Supreme Court) are referred to by "R" and the appropriate page numbers (*e.g.*, "R at 1a").

Befwick delivered a check to Massachusetts Mutual purporting to comply with the first condition of Judge Hirsh's Order and Decree. However, that check was dishonored by the bank, returned to Massachusetts Mutual stamped "insufficient funds", and charged to Massachusetts Mutual's bank account (R at 33a). Four days later, Befwick gave Massachusetts Mutual a second check for other lease payments. That check also bounced (R at 33a-34a).

Massachusetts Mutual then filed an affidavit of noncompliance in accordance with the Order and Decree (R at 33a). The affidavit stated that Befwick's check delivered to comply with the first condition of the Order and Decree had bounced and that the second check had also been dishonored.

On December 12, 1972 the Prothonotary of the trial court issued a writ of possession to Massachusetts Mutual as directed by the Order and Decree (R at 1a). Thereafter, Befwick filed a petition seeking a rule to show cause why the writ of possession should not be stricken and seeking a stay of proceedings (R at 24a). This time Befwick's petition was predicated on a claim that "money was available" in the bank after the due date set by the Order and Decree (R at 26a). Befwick chose not to conduct any depositions concerning this "tender" as it had done previously in connection with its petition to open the judgment.

Judge Hirsh held two extended conferences on Befwick's petition. By agreement of counsel and Judge Hirsh, both counsel and the principals attended the second conference. At that time Befwick still did not have sufficient funds to cover the dishonored checks and pay current rents. Judge Hirsh then denied Befwick's petition because it was insufficient as a matter of fact and law (R at 30a-32a).

Befwick appealed to the Pennsylvania Superior Court. The briefs, Record, extensive oral argument by both

parties before the Superior Court and a letter "supplement" sent by Befwick to the Court disclosed that there were no issues of fact and that Befwick's claims were insufficient as a matter of law. Consequently, the Superior Court rejected them by its affirmance per curiam of the trial court's decision (P at 2a).

Befwick then petitioned the Pennsylvania Supreme Court, which granted *allocatur*. The Pennsylvania Supreme Court considered the briefs, the Record and oral argument, and then affirmed per curiam the order of the Superior Court with the notation—"Mr. Justice Roberts would dismiss the appeal as improvidently granted" (P at 1a).

Subsequently Befwick filed its Petition for Writ of Certiorari with this Court. Befwick asserts in its Petition that the Pennsylvania judiciary at the trial and both appellate court levels denied Befwick due process guaranteed under the Fourteenth Amendment to the United States Constitution. Befwick claims it was entitled to (1) an evidentiary hearing by the trial court on its petition to strike the writ of possession or leave to amend, and (2) more than per curiam affirmances by the two Pennsylvania appellate courts. For the reasons set forth herein, Befwick's Petition for Writ of Certiorari is utterly without merit.

ARGUMENT.

There is no federal question involved in this case. The decisions of the several Pennsylvania courts which have already ruled against Petitioner in no way conflict with the decisions of this Court. Petitioner really seeks to have this Court review the Pennsylvania courts' view of Pennsylvania law and their application of Pennsylvania law to the facts of this case.

I. The Fourteenth Amendment Does Not Require Leave to Amend or an Evidentiary Hearing Where There Are No Disputed Issues of Fact and a Party Is Not Entitled to the Relief Sought as a Matter of Law.

Using inflammatory rhetoric and changing its story as it goes along, Befwick attempts to mask the case before this Court. This case simply involves a commercial tenant which violated a number of conditions of a commercial lease, including the payment of rent. After being given a second chance by Order and Decree of the trial court, the tenant again failed to comply. The trial court concluded the tenant was not entitled to a third chance—concluded that its Order and Decree must be enforced. The Pennsylvania appellate courts agreed.

The trial court, the Pennsylvania Superior Court and Pennsylvania Supreme Court have all rejected Befwick's claim that a so-called tender, made after the specific due date in the trial court's Order and Decree, is ground for striking a writ of possession issued in accordance with the Order and Decree. There were no issues of fact before Judge Hirsh in the trial court, and as a matter of law Befwick was not entitled to relief. At each stage of the appellate proceedings Befwick significantly shifted its story in an attempt to create a basis for relief (see footnotes 4-6, *infra*). However, the appellate courts correctly rejected Befwick's new versions as insufficient to deprive Massa-

chusetts Mutual of possession to which it was clearly entitled.

A. Pennsylvania Law Did Not Provide for a Tender.

In both the Pennsylvania Superior and Supreme Courts, Befwick argued that the Pennsylvania Landlord and Tenant Act [2] permitted Befwick to make a late "tender" to void the writ of possession. Both courts properly rejected Befwick's arguments. Befwick simply seeks review of those decisions by this Court (Petition, pp. 10, 11).

Befwick contended that the Pennsylvania Landlord and Tenant Act limited Massachusetts Mutual's right to possession. However, the remedy being pursued by Massachusetts Mutual was expressly provided for by the commercial lease and was independent of the Pennsylvania Landlord and Tenant Act. Moreover, Section 511 of Article V of the Act specifically exempted the action brought by Massachusetts Mutual from the Act.

Even if the Pennsylvania Landlord and Tenant Act had been applicable, it would not have permitted tender in this case. The Act permits tender only "in any case for the recovery of possession *solely* because of failure to pay rent" (emphasis supplied). Here Befwick violated many other conditions of the lease as well (R. at 3a, 16a-17a). Thus, even if the provision of the Pennsylvania Landlord and Tenant Act relied upon by Befwick had been applicable, which it was not, Befwick's claim had to be denied.

B. Court Orders Must Be Complied With.

Befwick argued in the appellate courts below that it was entitled to "tender" money to Massachusetts Mutual *after* the specific due date prescribed by the Order and

2. Specifically, Section 504, Act of April 6, 1951, P. L. 69, Art. V, §§ 501-511, 68 P. S. §§ 250.501-511.

Decree had passed without compliance. To reach the conclusion Befwick urged, the courts below would have had to ignore completely the Order and Decree, Bewick's own sworn statements, and the prior history of the case. The trial court's Order and Decree specified the time by which monies were to be paid. No tender was proper which did not fully meet the requirements of the Order and Decree. Since Befwick failed to comply with the very first condition of the Order and Decree, the judgment was in effect and Massachusetts Mutual was entitled to its property.

Befwick claims that *Universal Builders Supply, Inc. v. Shaler Highlands Corp.*, 405 Pa. 259, 175 A. 2d 58 (1961), supports its contention (Petition, pp. 6, 12). However, *Shaler* simply reinforces Massachusetts Mutual's position. There the lower court, upon petition to stay a mortgage foreclosure to satisfy a money judgment entered when a consent decree was not complied with, had modified the consent decree, extending the deadline for and ordering acceptance of payment. The Pennsylvania Supreme Court reversed and held that the lower court had no authority to change or modify the original consent decree.[3]

3. The Pennsylvania Supreme Court remanded the *Shaler* case for determination by the lower court of a pending petition to open judgment. However, in the case at bar the petition to open judgment had already been denied *with prejudice* by the trial court as part of the Order and Decree (R at 21a) and, therefore, under the *Shaler* rule could not be altered.

As to binding and res judicata effect of consent decrees in Pennsylvania, see also *Zampetti v. Cavanaugh*, 406 Pa. 259, 176 A. 2d 906 (1962) and *Baran v. Baran*, 166 Pa. Superior Ct. 532, 72 A. 2d 623 (1950).

Barraclough v. Atlantic Refining Co., 230 Pa. Superior Ct. 276, 326 A. 2d 477 (1974), cited by Befwick at page 12 of its Petition, similarly fails to support Befwick's claims. It is inapposite in that no Order and Decree was involved. In *Barraclough* payments under a lease were faithfully made, but sent to the wrong party because of failure of the landlord to give proper notice to the tenant. That case is a far cry from Befwick's patent violation of the Order and Decree involved here.

C. There Were No Issues of Fact.

Befwick's second petition in the trial court did not and could not raise any issues of fact. There could have been no "tender" as a matter of law. Accordingly, neither amendment of Befwick's petition nor a hearing was required. Any further proceeding before Judge Hirsh would have only improperly delayed Massachusetts Mutual's rightful possession of its property. Befwick never asked the trial court for leave to amend or even suggested that a better version of its story was available. Even the "better" versions argued to the Pennsylvania Superior and Supreme Courts (see footnotes 5 and 6, *infra*) failed to support Befwick's claim.

Befwick appears to contend that in the case of every petition addressed to a trial court, even where there can be no better statement of the facts, a lower court must, *sua sponte*, enter an order granting leave to amend. This is nonsense. Befwick's version of the "tender" story in the trial court was not merely technically insufficient. The sworn averments were flatly false, as conclusively shown by the bank statement submitted by Befwick.[4] Befwick's second version, presented for the first time in the Pennsylvania Superior Court, represented a significant shift of Befwick's story and was also untrue.[5] Befwick's third

4. The petition Befwick presented in the trial court (R at 26a) represented that "money was available" in Befwick's bank account one week before the affidavit of noncompliance was filed (December 11—R at 1a) and the Writ of Possession issued (December 12—R at 1a). One week prior to those dates would have been December 4 and 5. The bank statement heavily relied upon by Befwick in its brief in the Pennsylvania Superior Court showed the trial court version to be insufficient in fact—the balance in the bank was a mere $7.87 (R at 37a).

5. Befwick claimed in the Superior Court that it had alleged in the trial court that a "tender" was made on December 8, 1972 (after the date specified by the Order and Decree). But the trial court petition had alleged that the so-called tender occurred on

version, presented to the Pennsylvania Supreme Court, was equally incredible and contrary to Befwick's sworn statements in the trial court.[6]

Befwick asserts that due process requires a hearing in every case, but cites no authority to support this. Indeed the very rules of procedure promulgated by order of this Court belie this assertion. See Fed. R. Civ. P. 12(c) and 56 and corresponding Pennsylvania R. Civ. P. 1034 and 1035, providing for motions for judgment on pleadings and summary judgment.

The contentions advanced by Befwick in its petition before the trial court were inadequate as a matter of admitted fact and as a matter of law. Thus there was no need for an evidentiary hearing. The orders and decisions of the several Pennsylvania courts were fully consonant with due process.

II. The Fourteenth Amendment Does Not Require an Appellate Court to File an Opinion Articulating Its Reasons for a Per Curiam Affirmance.

Petitioner's contention that due process requires appellate courts to file detailed opinions each time a lower

5. (Cont'd.)
December 4th or 5th (see footnote 4, *supra*). The absence of money in the bank on the 4th and 5th shows why there was such a significant shift in Befwick's story (R at 37a).

6. In the Pennsylvania Supreme Court Befwick claimed that the sworn statement of Befwick's president in the trial court was not true due to an error of Befwick's counsel as to the date the writ of possession was issued (P at 33a). But this claim was patently false also, for the petition in the trial court showed that Befwick's counsel knew very well when the writ of possession was issued (R at 24a).

Befwick's Petition to this Court has abandoned the unsuccessful "mistake" argument made in the Pennsylvania Supreme Court and reinstated the version presented to the Pennsylvania Superior Court. Befwick has thus attempted significant shifts in its story to suit its argument at each stage of its appeal.

court decision is affirmed is equally without merit. To even make such an argument is to imply that where no opinion is written the justices of the appellate courts cannot have given due consideration to the issues presented on appeal. The practice of virtually every appellate court in the United States, including this Court, supports the affirmance of decisions without opinion.

Moreover, this issue was not raised in the court below. If Befwick truly believed that a per curiam Superior Court order violated Befwick's constitutional rights, it would have raised the question in the Pennsylvania Supreme Court. However, nowhere in the statement of questions presented is it even hinted that the Pennsylvania Supreme Court was being asked to review the absence of a detailed opinion of the Superior Court (P at 27a). Accordingly, Petitioner has failed to preserve this question for review in this Court. *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 n. 6, (dissent) 334-336 (1968); Pennsylvania Supreme Court Rule 52.

CONCLUSION.

Befwick has been accorded due process throughout this case. Indeed when Befwick was given a second chance by the trial court's Order and Decree, Befwick was accorded due process plus. Yet Befwick persisted in its violations and failed to fulfill even the first condition of the trial court's Order and Decree. For the reasons set forth above, there was no need for an evidentiary hearing or for detailed appellate decision. Respondent urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

WILLIAM H. LOWERY,
A. C. F. FINKBINER, III,
DECHERT PRICE & RHOADS,
3400 Centre Square West
1500 Market Street,
Philadelphia, Pa. 19102
Attorneys for Respondent, Massachusetts Mutual Life Insurance Company.

January 29, 1976.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 10 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1975
No. 75-847

BEFWICK OF PHILADELPHIA, INC.,
Petitioner

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY t/a THE PUBLIC LEDGER BUILDING,
Respondent

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

PETITIONER'S REPLY BRIEF

PAUL AUERBACH,
Attorney for Petitioner

212 Sycamore Avenue
Merion, Penna. 19066

Merrelle Printing Co., Law Printers, Box 100, Bryn, Pa. 19020

Argument

PETITIONER'S REPLY BRIEF

Respondent—on page 10 of its brief—argues that the Pennsylvania Supreme Court was never requested to review the issue of lack of opinion by the Superior Court and therefore Befwick cannot raise said issue before this Honorable Court. Respondent cites *Amalgamated Food Employees Union vs. Logan Valley Plaza, Inc.,* 391 U.S. 308, 313, fn. No. 6, and Pennsylvania Supreme Court Rule 52 in support of its position.

It is clear that the cited case does not support Respondent's position. Footnote 6 merely records the fact that the union had not raised one of its arguments before the state court without determining the legal effect thereof. In footnote 1 the Court specifically noted that it did not discuss said argument because it had already decided the case in favor of the union on other grounds.

As to Rule 52 of the Pennsylvania Supreme Court it is relevant to note that Respondent does not set forth the text of the rule it wishes the Court to review. In fact, said sule in its last sentence provides: "no point will be considered which is not set forth in or *necessarily suggested by the statement of questions involved".* The fact is that your Petitioner set forth the failure of the Superior Court to issue an opinion in its Petition for Allocatur before said Supreme Court (Paragraph 5, R. 18a) and then covered it as part of Statement of Questions Involved, number 4.

Argument

Throughout its brief Respondent continually refers to the "Trial Court" deciding this or doing that. Respondent's counsel knows the difference between a Trial Court and a Motion Judge and one is forced to conclude that at very least there is an effort to mislead this Honorable Court. At no time in the entire history of this case was there a trial or even a scheduling of a trial. Judge Hirsch was at all times a Motion Judge who rubber-stamped the consent decree of November 14, 1972 and then, over Petitioner's objection, dismissed its petition to set aside the writ of possession without allowing Befwick the opportunity to take depositions and/or have a hearing.

In this latter regard, Petitioner notes that on page 3 of Respondent's brief it claims that Petitioner chose not to take depositions. As respondent well knows, Petitioner was in fact precluded from taking depositions by Judge Hirsch as is set forth in Petitioner's brief in the statement of facts (page 4) and in footnote number 2 (page 11).

Finally, Respondent claims on page 5 of its brief that Petitioner wants this Honorable Court to review the merits of its claim. This is patently false. Petitioner, on page 12 of its brief, specifically notes that the merits of the case are not before the Court. An unbiased reading of Petitioner's brief compels the conclusion that everything was geared to the lack of procedural due process.

However, Respondent—after averring this inaccurate statement—goes into great detail on the merits with the obvious intent to persuade the Court to overlook the glaring procedural injustice by reason of Respondent's biased view of the case. Petitioner is to be condemned without

an opportunity to explain and prove its view of the facts and interpretation of the relevant law. Respondent is quite aware that Petitioner—once granted a hearing—stands an excellent chance of prevailing and its attempt to argue its side of the merits instead of the procedural issues should be rejected. The fact that the lower Court failed to discuss the issues material to the merits and the Pennsylvania appellate courts ignored said lower court opinion but refused to give any reasoned explanation in its place proves that the issues are far from clear.

Wherefore, it is respectfully requested that this Honorable Court grant the petition for writ of certiorari.

Respectfully submitted,
PAUL AUERBACH,
Attorney for Petitioner.

212 Sycamore Avenue
Merion, Penna., 19066
1-215-841-4258